Supreme Court, U. S.
FILED
MAR 12 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1386

ORVAIL SHERMAN,
Petitioner,

VERSUS

AMERICAN FEDERATION OF MUSICIANS,
an Unincorporated Association,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1979

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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AMERICAN FEDERATION OF MUSICIANS,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Orvail Sherman, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the dismissal by the United States District Court for the Western District of Oklahoma of the action brought by the Petitioner against the Respondent.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*. The opinion of the United States District Court for the Western District of Oklahoma is unreported, and appears at Appendix B, *infra*.

JURISDICTION

The decision of the Court of Appeals affirming the District Court's Order was entered on September 13, 1978. A Petition for Rehearing was denied on December 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether a national union subjects itself to the jurisdiction of the United States District Court for the Western District of Oklahoma by distributing and enforcing a national defaulter's blacklist in the Western District of Oklahoma which contains the name of the Petitioner and does great financial harm to the Petitioner?

STATUTORY PROVISIONS INVOLVED

29 U.S.C., Section 185:

> "(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

29 U.S.C., Section 187:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any

> activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

15 U.S.C., Section 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

28 U.S.C., Section 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

28 U.S.C., Section 1331:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

STATEMENT OF FACTS

Orvail Sherman, hereinafter referred to as Petitioner, filed his Complaint on September 25, 1975. The Complaint alleged that the three Defendants in the trial court, to-wit: American Federation of Muscians (AFM) and two local unions, were guilty of conspiring to violate anti-trust laws as against the Petitioner. All three of the Defendants in the trial court answered on the 10th day of November, 1975. Thereafter, pursuant to a Motion to Dismiss on behalf of American Federation of Musicians, the trial court set the aforesaid Motion to Dismiss for evidentiary hearing. The Order of the Court was filed December 10, 1976 (Appendix B, *infra*), wherein the action was dismissed as against American Federation of Musicians because said national union was not subject to the jurisdiction of the United States District Court for the Western District of Oklahoma. Pursuant to a joint stipulation, the other two Defendants have been dismissed. The decision of the District Court was appealed to the Court of Appeals which affirmed the lower court's decision. A Petition for Rehearing was denied on December 15, 1978.

The Complaint filed by the Petitioner alleged that the AFM, a national union, forced him out of business, causing him damages. The Petitioner alleged a violation of the Sherman Anti-trust Act and the National Labor Relations Management Act. The Petitioner was in the business of running a nightclub that used live entertainment as a drawing card for customers. The Petitioner got into a contract dispute with a member of AFM. As a result of this dispute, the Petitioner's name was placed on an interstate defaulter's blacklist and said blacklist was distributed throughout the United States by the national union, AFM. The National blacklist resulted in Petitioner being unable to obtain union live entertainment in his nightclub and he therefore lost his business and suffered great financial harm. This blacklist was distributed by AFM in the Western District of Oklahoma, as well as nationally. When the Petitioner tried to get into the nightclub business in the Western District of Oklahoma, he was told by the local union that as long as he was on the defaulter's blacklist he could not get live entertainment, and thereafter he filed this action.

REASONS FOR GRANTING THE WRIT

It was the national union, American Federation of Musicians, that placed the Petitioner on the defaulter's blacklist. This blacklist is distributed nationally and gives the national union a great deal of clout and power in the entertainment field. This blacklist can be effectively used to suppress the enemies of the union or those in disfavor with the union. Labor unions have become viable segments of our economy and should not receive any special protection from the courts. The Tenth Circuit Court of Appeals spoke to this point in *International Union of Operating Engineers* v. *Metropolitan Guild-Tecon*, 400 F.2d 261 (1968), when it stated (at page 263):

> ". . . an International is not entitled to the best of both worlds — on the one hand being able to swing its weight, and on the other hand being able to avoid responsibility therefore."

The AFM blacklisted the Petitioner in the Western District of Oklahoma. Because of this action on the part of AFM *in the Western District of Oklahoma,* the Petitioner could not use members of the local unions in his nightclub business. This Honorable Court has stated, *AFM* v. *Carroll,* 391 U.S. 99, 88 S.Ct. 1562 (1968), "Virtually all musicians in the United States and the great majority of the orchestra leaders are union members." This situation results in the national blacklist being a very effective source of power and influence for the national union. Therefore, the national union should be responsible for the abuses and damages caused by said blacklist *wherever the abuses and damages may occur.*

Two United States District Court decisions (outside of the Tenth Circuit) should be considered. In *Molded Materials Company* v. *International Union of Electrical, Radio and Machine Workers,* 418 F.Supp. 548 (W.D. Pa. 1976), the Court held that it must be shown that the international union was involved in the specific local union activity complained of before international union will be held liable. In the instant case, the AFM was certainly involved in the union blacklisting of the Petitioner *in the Western District of Oklahoma* by distributing said blacklist and insisting upon its enforcement. In *F. A. Villalba and Company* v. *The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry,* 413 F.Supp. 94 (W.D. Tex., 1976), the Court stated:

> "In consiering whether as matter of law employer could recover from international union on theory of vicarious liability for activities of local, court was required to look to constitution and by-laws of the international; question was whether international's constitution provided for such far-reaching control of local unions that jury might find that locals, in essence, were not autonomous but were sub-divisions of the international."

The AFM strongly regulates the activities of the locals. Locals are required to adopt the AFM Constitution and By-laws and that local constitutions and by-laws will be subordinate to national ones. In the instant case, the AFM sent the national defaulters blacklist into the Western District of Oklahoma for implementation by the locals. Locals are required by the national to enforce the defaulters blacklist. By that action, AFM subjected itself to the jurisdiction of the United States District Court for any abuse or damage caused by the blacklist. The above-cited cases are in conflict with the decision of the Court of Appeals in the instant case.

In *New England Telegram and Telegraph* v. *International Brothers,* 384 F.Supp. 752 (D.C. Mass., 1974), the Court held in view of overpowering and overwhelming control of the parent over the local union, and the general conduct of their affairs, it was impossible to absolve the parent of responsibility in bargaining agreements. The instant situation is analogous. The parent AFM has overwhelming control and does business wherever a local is, because a local is only doing the national's business. This Honorable Court has approved suing multi-state, unincorporated associations such as a labor union, wherever it is doing business. *Denver and Rio Grande Western R.R. Co.* v. *Brotherhood of R.R. Trainmen,* 387 U.S. 556, 87 S.Ct. 1746 (1967). The defaulters blacklist is a part of the busi-

ness of the AFM. By distributing and enforcing its defaulters blacklist in the Western District of Oklahoma, the AFM subjected itself to the jurisdiction of the United States District Court in that District.

The Court of Appeals mistakenly relied upon *Barefoot* v. *International Brotherhood of Teamsters, C. W. & H*, 424 F.2d 1001 (10th Cir., 1970). This case involved "unofficial" and responsive advice from the parent union to the local. On these facts a Motion to Dismiss as to the parent union was upheld. This case is distinguishable from the case at bar. The blacklist is not "unofficial"; it is very official. The blacklist is not responsive in nature; it is an independent affirmative act on the part of AFM. The Court of Appeals relied on *Barefoot*, supra, in its opinion, and for this reason alone, this Honorable Court should grant certiorari.

The decision of the Court of Appeals is also contrary to the legal principles laid down by this Court in two landmark decisions. *International Shoe Company* v. *State of Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945) and *McGee* v. *International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199 (1957). These principles have been upheld by this Court very recently. *Kulko* v. *Superior Ct. of California*, 98 S.Ct. 1690 (1978). Although these cases involved state court jurisdiction, the holdings and dicta of these cases, when applied to the facts of the instant case, clearly demonstrate that AFM subjected itself to Federal District Court jurisdiction by *distributing* and *enforcing* its defaulter's blacklist in the Western District of Oklahoma. This Court noted that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *McGee*, supra. This trend was attributed to the growing amount of business and commerce conducted across state lines and to the advances in transportation and communication; and that was in 1957. The defaulters blacklist is an important function of the business of AFM. The AFM conducted the business of distributing and enforcing this blacklist into all fifty states and should be answerable in any of the federal jurisdictions in which this business activity causes damage or harm.

CONCLUSION

The question presented is of profound significance in national labor law. For the reasons set forth above, a writ of certiorari should issue to review the decision of the Court of Appeals.

Respectfully submitted,

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Attorneys for Petitioner,
Orvail Sherman

March, 1979

CERTIFICATE OF SERVICE

Steven W. Taylor, hereby certifies that on the ..... day of March, 1979, he mailed a true and correct copy of the above and foregoing to the law firm of Van Arkel, Kaiser, Gressman, Rosenberg & Driesen, 1828 L Street, N.W., Washington, D. C. 20036, and the law firm of Sherman and Gay, 27 North Harvey, Oklahoma City, Oklahoma, attorneys for Respondents herein.

.....

Steven W. Taylor

APPENDICES

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
SEP 13 1978
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ORVAIL SHERMAN, Plaintiff-Appellant,	)	
v.	)	NO. 77-1066
AMERICAN FEDERATION OF MUSICIANS, an Unincorporated Association, Defendant-Appellee.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 75-0820-D)

Warren Gotcher, McAlester, Oklahoma, for Plaintiff-Appellant.

Michael Wolf, Washington, D. C. (Henry Kaiser, Ronald Rosenberg, George Driesen, Washington, D. C., on the brief), for Defendant-Appellee.

Before DOYLE and LOGAN, Circuit Judges, and STANLEY, Senior District Judge*.

*Of the District of Kansas, sitting by designation.

STANLEY, Senior District Judge.

This is an appeal from an order dismissing the complaint in an action brought by the plaintiff-appellant, a resident of Oklahoma, against the American Federation of Musicians (AFM). The trial court dismissed the complaint after an evidentiary hearing, having concluded that in personam jurisdiction over AFM was lacking and that venue did not properly lie in the Western District of Oklahoma under either the Labor Management Relations Act, 29 U.S.C. § 185(c), or under the Clayton Act, 15 U.S.C. § 15, both of which were invoked by the plaintiff. The plaintiff then dismissed the action as to the co-defendants, Musicians Protective Union No. 367 AFM and Oklahoma City Federation of Musicians No. 375.

The complaint sets forth two claims for damages, one for violation of the secondary boycott provisions of the Labor Management Relations Act, 29 U.S.C. § 187, and one alleging an illegal conspiracy among the defendants and theatrical booking agents to restrain trade. The plaintiff alleges that he had owned and operated a nightclub in California and that as the result of a dispute with musician-members of AFM the defendant had "blacklisted" him by publishing his name in a "defaulters' list" appearing in an AFM periodical disseminated to all of its members, including those residing in or working in the Western District of Oklahoma; that because of the inclusion of his name on the defaulters' list no union musicians would perform at a nightclub he had intended to open in Oklahoma and no booking agent (non-members of but licensed by AFM) would book musicians or musical groups into an establishment owned or operated by him. The effect of such actions, described as a secondary boycott and as in restraint of trade, are alleged by the plaintiff to have made it impossible for him to operate a nightclub in Oklahoma and forced him out of business thereby causing him to suffer great financial loss.

AFM moved to dismiss the complaint for lack of in personam jurisdiction and improper venue. There being no statutory direction for procedure upon the issue of jurisdiction, the mode of its determination is left to the trial court. *Gibbs* v. *Buck*, 307 U.S. 66, 71 (1939); *Schramm* v. *Oakes*, 352 F.2d 143 (10th Cir. 1965); *Data Disc, Inc.* v. *Systems Tech. Assoc. Inc.*, 557 F.2d 1280 (9th Cir. 1977). Judge Daugherty, unable to decide the issues on the affidavits submitted, ordered an evidentiary hearing to develop fully the issues of jurisdiction over the person of AFM and of venue. In so doing he exercised his discretion wisely, for, as the Second Circuit has said,

> Not only does logic compel initial consideration of the issue of jurisdiction over the defendant—a court without such jurisdiction lacks power to dismiss a complaint for failure to state a claim—but the functional difference that flows from the ground selected for dismissal likewise compels considering jurisdiction and venue questions first. A dismissal for lack of jurisdiction or improper venue does not preclude a subsequent action in an appropriate forum, whereas a dismissal for failure to state a claim upon which relief can be granted is with prejudice. [*Arrowsmith* v. *United Press International*, 320 F.2d 219, 221.]

After the hearing, at which the trial court sat as the trier of the factual issues necessary to determination of the issues of jurisdiction and venue, a memorandum of decision including findings of fact and conclusions of law, was filed. The trial court found, *inter alia*, that AFM did not maintain its principal office in the Western District of Oklahoma; that no officer or agent of AFM had represented or acted for its employee members in the district [29 U.S.C. § 185(c)]; that the only agent of AFM who had come to the district was one who visited annually and then engaged only in auditing the books of the local union for the benefit of AFM; that AFM did not reside in, had no office in, was not found in, and did not have an agent in the district

[15 U.S.C. § 15]. The findings are amply supported by the evidence and clearly are not erroneous. We may not disturb them. Rule 52(a), Fed.R.Civ.P., *Butler* v. *Hamilton*, 542 F.2d 835 (10th Cir. 1976).

The court concluded that the agent who visited Oklahoma once a year was not then representing or acting for employee members of AFM but for AFM itself; that the mailing of a monthly publication from AFM headquarters in New York into Oklahoma did not constitute AFM being found in Oklahoma; that AFM in publishing the list of defaulters enunciated policy and acted responsively rather than affirmatively; that the requirements of neither 29 U.S.C. § 185(c) nor of 15 U.S.C. § 15 were met by any of the activities of AFM conducted within the district; and that the court lacked in personam jurisdiction over AFM and that venue was improper.

At the outset we must consider, on our own motion, whether the order dismissing the complaint is an appealable order. AFM's motion was for dismissal of the complaint under Rule 12(b)(2) and (3), Fed.R.Civ.P. The order from which the appeal is taken did not expressly dismiss the action and ordinarily would not be a final and appealable decision within the meaning of 28 U.S.C. § 1291. *Midwestern Development, Inc.* v. *City of Tulsa, Oklahoma*, 319 F.2d 53 (10th Cir.), *rehearing denied*, 333 F.2d 1009, *cert. denied*, 379 U.S. 989 (1964). The Supreme Court has said that the requirement of finality imposed by section 1291 is to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545; *Gillespie* v. *U. S. Steel Corp.*, 379 U.S. 148, 152. The Ninth Circuit has held that under special circumstances a court of appeals may regard as final and appealable an order which dismisses the complaint but not the action and that such "special circumstances"

> . . . must be such as to make it clear that the court determined that the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling plaintiff to assume that he had no choice but to stand on his complaint. *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962).

Here, following a full evidentiary hearing, the court announced orally that the AFM's motion would be sustained for lack of personal jurisdiction and venue. No amendment or supplementation of pleadings was sought and both parties have treated the order throughout the appellate proceedings as final and appealable. It is clear that the trial court determined that the action could not be saved by an amendment of the complaint which the plaintiff could reasonably be expected to make and that the plaintiff assumed, with reason, that he had no choice but to stand on his complaint and the evidence adduced at the hearing. The special circumstances permit us under the teaching of *Cohen* and *Gillespie, supra*, to regard the order of dismissal as final and appealable. *Korgich* v. *Regents of the New Mexico School of Mines*, ... F.2d ..... (10th Cir. 1978).

The appellant contends that AFM was actively engaged in representing its members within the district by publishing the defaulters' list and disseminating it within the district. The trial court held that this contention runs contrary to the rationale of *International Union of Op. Eng.* v. *Metropolitan-Guild-Tecon*, 400 F.2d 261 (10th Cir. 1968), and *Barefoot* v. *International Bro. of Teamsters, C., W. & H.*, 424 F.2d 1001 (10th Cir.), *cert. denied*, 400 U.S. 950 (1970). We agree.

In *Metropolitan* and *Barefoot* we held that venue-jurisdiction under 29 U.S.C. § 185(c) depends on what a labor organization is actually doing through its authorized representatives in the district rather than on how their responsibilities and functions may be internally defined. In *Barefoot* we said that the pragmatic analysis contem-

plated in *Metropolitan* presupposes physical presence of a bonafide representative of the national labor organization within the district and that when the national organization's role is responsive rather than affirmative, and is conducted outside the district, its liability to suit in that district is not contemplated by section 185(c). Although enunciations of policy, advice and instructions to local affiliates may, when implemented, have an effect on local labor disputes, the effect cannot be equated with the criteria established by section 185(c). The appellant argues that the instant case is factually distinguishable from *Barefoot* because the activities of the national teamsters organization in *Barefoot* involved only "unofficial" advice. The *Barefoot* decision did not turn on whether the nature of the national union's participation was "official" or "unofficial" but rather on the role actually played by the national union within the district, i.e., responsive rather than affirmative.

The federal courts have only such jurisdiction as is vested in them by Congress. It is undisputed that Congress may prescribe limits within which the judicial power may be exercised. *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943). The jurisdiction granted by 29 U.S.C. § 185(c) extends only to a labor organization in the district in which such organization maintains its principal office or in which its duly authorized officers or agents are engaged in representing or acting for employee members. Any person seeking to recover under the anti-trust laws (15 U.S.C. § 15) may sue therefore only in the district in which the defendant resides or is found or has an agent.

The trial court's findings of fact were supported by the evidence and most certainly are not erroneous. We agree with the trial court's conclusions of law as announced orally at the conclusion of the evidentiary hearing and as incorporated in the memorandum of decision. AFFIRMED.

APPENDIX B

FILED
DEC 10 1976
REX B. HAWKS
CLERK U. S. DISTRICT COURT
By (signature illegible)
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ORVAIL SHERMAN, Plaintiff, -vs-	)	
AMERICAN FEDERATION OF MUSICIANS, An Unincorporated Association; MUSICIANS PROTECTIVE UNION #367 AFM, an Unincorporated Association and a Local of the American Federation of Musicians; and OKLAHOMA CITY FEDERATION OF MUSICIANS, #375, an Unincorporated Association and a Local of the American Federation of Musicians, Defendants.	)	No. CIV-75-0820-D

ORDER

The Defendant American Federation of Musicians, an Unincorporated Association (AFM) has filed herein a Motion to Dismiss in which said Defendant asserts that this Court has neither jurisdiction nor venue over said Defendant with respect to Plaintiff's case under either the Labor Management Relations Act, 29 U.S.C. §185(c), which provides:

> "For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have

> jurisdiction of a labor organization (1) in the district where such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

or the pertinent Anti-Trust statute, 15 U.S.C. §15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney fee."

Plaintiff proceeds herein asserting both a Labor Management Relations Act violation and an Anti-Trust violation.

In an Order entered herein on August 23, 1976 the Court considered said Motion to Dismiss and being unable to decide the issues on affidavits submitted, decided under *Schramm* v. *Oakes*, 352 F.2d 143 (Tenth Cir. 1965), to conduct an evidentiary hearing to fully develop the venue/jurisdictional facts of this case. Such an evidentiary hearing has been conducted with both sides in attendance, evidence has been received and arguments heard. The Court finds that the Motion under consideration should be granted as this Court has neither jurisdiction nor venue over AFM under either of the pertinent statutes.

As to 29 U.S.C. §185(c), *supra*, there is no evidence that AFM maintains its principal office in Oklahoma. Therefore for said entity to be suable in this district under said statute Plaintiff must establish that its duly authorized officers or agents are engaged in representing or acting for employee members in this district. Our Court of Appeals has treated with this statute in two notable cases, the first

being *International Union of Operating Engineers* v. *Metropolitan-Guild-Tecon*, 400 F.2d 261 (Tenth Cir. 1968) and the second being *Barefoot* v. *International Bro. of Teamsters, C., W. & H.*, 424 F.2d 1001 (Tenth Cir. 1970). In the *Metropolitan* case our Court of Appeals found that the International Union had a duly authorized agent in the district engaged in representing or acting for employee members in that he represented such employee members in negotiating collective bargaining agreements and pursuing grievance claims and other activities. In *Barefoot* our Court of Appeals held that the International Union did not have an officer or agent in the district engaged in representing or acting for employee members under said statute although a Local had requested and received advice from the International given from its national headquarters. This case in mentioning the *Metropolitan* case stresses the need for the "physical presence" in the district of such an officer or agent and further under said statute generally provides that conduct of International in responding to queries of Locals and furnishing guidance and announcing policies, etc. to local unions does not amount to the International having an officer or agent in the district subjecting it to jurisdiction under said statute in a Court where the Local is situated.

The evidence at the hearing conducted in the instant case reveals no officer or agent of AFM engaged in representing or acting for employee members in this district. The only agent of AFM to come to this district was one who came once a year and then engaged only in the activity of auditing the books of the Local to see if the Local had discharged its monetary obligations to AFM. It is quite clear that such agent when in Oklahoma was not representing or acting for employee members but was representing or acting for the International organization. Plaintiff contends that because he was placed on a California Local defaulter's list for not paying musicians, which default situation was later published in the National Journal

of AFM and mailed into Oklahoma, that such subjects AFM to suit in this State under 29 U.S.C. §185(c). This contention is not supported by the language of the statute and the *Metropolitan* and *Barefoot* cases. This type of activity is responsive and in the nature of policy and does not satisfy the requirements of said statute. Under the authority of *Barefoot* this evidence does not establish jurisdiction under 29 U.S.C. §185(c) and the Motion to Dismiss should be sustained in regard to the asserted Labor Management Relations Act claim.

As to jurisdiction and venue under the Anti-Trust statute, 15 U.S.C. §15, the Plaintiff must show that the Defendant AFM either resides or is found or has an agent in this judicial district. Under the evidence the Defendant AFM does not reside in this district. Nor does AFM have an agent in this district. It has no office in this district. An agent coming into this district one time a year for the purpose of auditing the Local books on behalf of the agent does not put an agent in this State within the meaning of said statute. Likewise Defendant AFM is not found under the evidence presented to the Court in this district. Again the agent of AFM coming into the State once a year to audit the books does not cause AFM to be found in this State. Nor does the mailing of a monthly publication from AFM headquarters in New York into Oklahoma constitute AFM being found in Oklahoma. Therefore as to Plaintiff's Anti-Trust case this Court lacks jurisdiction and venue of such suit and said Defendant's Motion to Dismiss as to this cause of action should likewise be sustained.

It is so ordered this 10 day of December, 1976.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

Entered in Judgment Docket on Dec. 10, 1976

Supreme Court, U.S.
FILED
MAY 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1386

ORVAIL SHERMAN,

Petitioner,

v.

AMERICAN FEDERATION OF MUSICIANS, an Unincorporated Association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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May, 1979

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1386

ORVAIL SHERMAN,

Petitioner,

v.

AMERICAN FEDERATION OF MUSICIANS, an Unincorporated Association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent American Federation of Musicians of the United States and Canada, AFL-CIO, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case.

QUESTION PRESENTED

In an action that is brought against a labor organization under Section 301 of the Labor Management Relations Act and Section 4 of the Clayton Act, does venue lie in a judicial district which the labor organization has not entered for the purpose of either representing or acting for its members?

STATUTES INVOLVED

All pertinent statutory provisions are referred to in the Petition, starting at page 2 thereof.

STATEMENT OF FACTS

Petitioner Orvail Sherman operated a night club known as Sherman's Palace in Vallejo, California. The club employed musicians as part of the entertainment that it provided to its customers. In October, 1971, Mr. Sherman employed a group of musicians known as the Sandy Knox Show. The group was employed under the terms of a written collective bargaining agreement between the musicians and Sherman's Palace, which provided for arbitration of all disputes arising under that contract.

During the engagement a dispute arose between the parties, resulting in discharge of the band prior to the end of the night club date. Pursuant to the parties' contract, the dispute was submitted to arbitration in the State of California. Petitioner appeared at and participated in the arbitration hearing, which resulted in a finding that $3,600 in unpaid wages was owed to the musicians. Petitioner refused to pay this amount and, to this day, has not paid the wages. Petitioner did not contest the propriety of the arbitration when it was held or at any time prior to the filing of his present lawsuit.

Because the Petitioner refused to satisfy the arbitration award, Local 367 of the AFM [1] (located in Vallejo, California) requested that Orvail Sherman

[1] Respondent American Federation of Musicians of the United States and Canada, AFL-CIO shall be referred to hereinafter as the "AFM."

and Sherman's Palace be placed on the AFM's "defaulters' list". This list is printed in the monthly AFM newspaper ("International Musician"), which is mailed to all AFM members. The purpose of the list is to advise all member musicians that the persons named thereon have been found in arbitration to have defaulted on the payment of wages to musicians. Petitioner continued to operate his business in California after his name was placed on the defaulters' list.

It was not until 1973 that the Petitioner moved to the State of Oklahoma, after he had closed his California night club. In the spring of 1975 his name was removed from the defaulters' list because of the closing of Sherman's Palace. In the fall of 1975, Sherman commenced this lawsuit against the AFM and Locals 375 (Oklahoma City, Oklahoma) and 367 of the AFM, and alleged that the default listing had prevented him from opening a new night club in Oklahoma. Sherman alleged in his complaint that he had incurred nine million dollars in damages.

In response to the complaint, the AFM moved that it be dismissed as a party to the lawsuit in that the District Court did not have *in personam* jurisdiction over the international union and that venue did not properly lie in the Western District of Oklahoma. Before ruling on the motion, the District Court conducted an evidentiary hearing. The court determined that the AFM maintains no office in the State of Oklahoma, has no agent or representative who engages in the representation of employees in the State of Oklahoma, and does not otherwise do business in the State of Oklahoma, so as to confer federal jurisdiction. Based upon these factual findings, the Dis-

trict Court granted the AFM's motion to dismiss, relying, in part, on *Barefoot* v. *International Brotherhood of Teamsters*, 424 F.2d 1001 (10th Cir. 1970), *cert. denied* 400 U.S. 950.[2] The Court of Appeals for the Tenth Circuit affirmed that decision.

REASONS FOR DENYING WRIT

The single question presented is not *whether* the Respondent international union can be sued, but rather *where* it can be sued. Section 301(c) of the Labor Management Relations Act of 1947 (the "LMRA"), codified as 29 U.S.C. Section 185(c), states that a labor organization may be sued only in the district in which the union maintains its principal office and in any district in which its authorized officers or agents "are engaged in representing or acting for employee members." Likewise, Section 4 of the Clayton Act, 15 U.S.C. Section 15, provides that a party-defendant may be sued only in the district in which it "resides, is found, or has an agent".

After a full and complete evidentiary hearing to find jurisdictional facts, the District Court determined that venue did not lie in the Western District of Oklahoma under either Section 301(c) of the LMRA or Section 4 of the Clayton Act. Instead, the court found that the AFM did not maintain its principal office in Oklahoma; that no officer or agent of the AFM had engaged in representing or acting for its employee members in the district; and, further, that the AFM did not reside in, had no office in, and was

[2] Two other defendants, Local 375 (Oklahoma City, Oklahoma) and Local 367 (Vallejo, California) of the AFM, were voluntarily dismissed by plaintiff prior to the Petitioner's appeal to the Court of Appeals for the Tenth Circuit.

not "found" in the Western District. The sole contact which it found between the AFM and the district was a once-yearly visit by an AFM representative who entered the District in order to audit the books of a local union affiliate for the benefit of the AFM, to determine whether the local had complied with its fiscal obligations to the international. Most important, no representative of the AFM ever entered or visited Oklahoma regarding the seminal wage dispute between the Petitioner and members of the AFM.

The Petitioner here contends that the AFM "actively engaged" in representing its members within the District in that it placed his name—at the request of a California Local—on its list of defaulters, and because it regularly includes the defaulters' list in its membership newspaper which it distributes to all AFM members, including those who live and work in the Western District of Oklahoma. The hard fact is that both the District Court and Court of Appeals found that the mailing of a monthly membership newspaper from AFM headquarters in New York City to Oklahoma, without more, did not cause the AFM either to be found in or to be engaged in representing members in the Western District of Oklahoma.

In drafting Section 301(c) of the LMRA and Section 4 of the Clayton Act, Congress intended to impose finite limits on the jurisdiction of the District Courts. Thus, the jurisdictional standards found in the two statutes are far more rigorous than most state long-arm statutes which typically permit suit in a forum against a party defendant who has never entered the state but by its actions outside that jurisdiction has caused an injury to occur within the forum state.

Neither Section 301 of the LMRA nor Section 4 of the Clayton Act expressly create venue in the district in which an injury has allegedly occurred, but instead provide for jurisdiction only in those districts in which the defendant has an office, is found or engages in representation activities.

The Petitioner would have this court reject long-standing case authority in the labor relations arena, *see Barefoot* v. *International Brotherhood of Teamsters, C.W. & H.*, 424 F.2d 1001 (10th Cir. 1970) *cert. denied*, 400 U.S. 950 and *International Union of Operating Engineers* v. *Metropolitan-Gill-Tecon*, 400 F.2d 261 (10th Cir. 1968), and in its stead permit the AFM to be sued "in any of the federal jurisdictions in which . . . [its] activity causes damage or harm." This Court has admonished District Courts that there is a "deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero* v. *International Term. Co.*, 358 U.S. 354, 379 (1959). And, when as here, a plaintiff's claim arises under a specific jurisdictional statute the federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, 292 U.S. 263, 270 (1937).

In *Denver & Rio Grande Western Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967), this Court stated that under Section 301(c) of the LMRA suits against unions may be maintained only in a district where "the responsible representatives of the union *take concrete action.*" 387 U.S., at 562-563 [emphasis added]. That standard was applied by the District Court and Court of Appeals in this

case. Both courts found under the statutory test requires that they examine "the role actually played by the National Union within the District," and both concluded upon the facts presented that the AFM had not engaged in representing employee members in Oklahoma.[3] Accord, *WHAM* v. *National Post Office Mail Handlers Division*, 99 LRRM 2980 (D.S.C. 1978). See also, *Dixie Carriers, Inc.* v. *National Maritime Union of America*, AFL-CIO, 35 F.R.D. 365, at 369-370 (S.D. Texas, 1964).

The Petitioner attempts to distinguish *Barefoot* because it involved "unofficial and responsive advice from the parent union", while here the listing and mailing by the AFM were "official" acts of the international union. The true significance of *Barefoot* is that venue did not lie in that case in the plaintiffs' forum even though the international union actually gave specific advice to local union officials concerning the labor dispute there at hand, while here there is no evidence at all of any specific contacts between the AFM in New York City and local union officials situate in Oklahoma. Indeed, if the Petitioner's argument that the AFM subjected itself to the jurisdiction of the District Court for the Western District of Oklahoma simply by mailing its monthly membership publication into that district is adopted, every interna-

[3] The Petitioner finds a conflict between the decisions of two District Courts in *Molded Materials Company* v. *International Union of Electrical, Radio and Machine Workers*, 418 F.Supp. 548 (W.D. Pa. 1976), and *F.A. Villalba and Company* v. *The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 413 F.Supp. 94 (W.D. Texas, 1976), and the decision of the Court of Appeals in this case. However, the District Court decisions are inapposite to the sole jurisdictional question that is in dispute here. Both opinions address the vicarious liability of an international union for acts

tional union would become subject to suit in any District Court in the United States under Section 301 of the LMRA and Section 4 of the Clayton Act merely by mailing trade publications nationwide.[4] Surely such all-encompassing susceptibility to suit in any federal district of the United States was not intended by Congress when it drew special venue provisions for the LMRA and the Clayton Act, and would do violence to that intention.

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committed by affiliated local unions and do not concern *where* such bodies can be sued for damages resulting from acts committed by member locals.

[4] Although the Petitioner includes a recitation of Section 4 of the Clayton Act in his reference to pertinent statutory provisions, he fails to argue in his Petition that venue lies against the AFM in the Western District under the federal anti-trust statutes. Assuming that the Petitioner does not intend to abandon that argument, the AFM submits that the facts found by the District Court equally support that court's finding that there was no basis for venue under Section 4 of the Clayton Act. The only possible basis for venue would be that the AFM is "found" in the Western District of Oklahoma. Numerous courts have interpreted that jurisdictional standard when applied to unincorporated associations to require that the party-defendant carry on a "substantial part" of its business activities in the district. *Braun* v. *Berenson*, 432 F.2d 538, at 544 (5th Cir. 1970). *See, In re Chicken Antitrust Litigation*, 407 F.Supp. 1285 (N.D.Ga. 1975). Under the interpretation adopted in *Berenson* and similar cases, the association must be "transacting business" continuously in the forum district for venue to be found.

The business of a labor union is representing employee members. Therefore, in order to find that a labor union is continuously transacting business in a district, it must be actively engaged in its business of representing employees. To that extent the jurisdictional tests of Section 301(c) of the LMRA and Section 4 are coextensive, and venue does not exist in the Western District of Oklahoma upon the facts found by the District Court.

CONCLUSION

For the reasons stated hereinabove, the Petition for a Writ of Certiorari should be denied.

ABATO AND ABATO, P.A.

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**Counsel of Record*

May, 1979

CERTIFICATE OF SERVICE

I, COSIMO C. ABATO, HEREBY CERTIFY that on this 30th day of May, 1979, three copies of the aforegoing Respondent's Brief in Opposition were mailed by first class mail, postage prepaid, to Steven W. Taylor, Esquire & Gotcher, Gotcher & Taylor, 325 East Parkway, Post Office Box "T", McAlester, Oklahoma 74501, attorneys for Petitioner herein.

Cosimo C. Abato

Cosimo C. Abato